



House Judiciary Committee Minority
B-351-C Rayburn House Office Building
Washington, DC 20515

House Judiciary Committee Majority
2138 Rayburn House Office Building
Washington, DC 20515

Re: H.R. 5825

September 26, 2006

Dear Representative:

The Electronic Frontier Foundation (EFF) is committed to ensuring the protection of our nation's security in a manner consistent with the Bill of Rights and the rule of law. EFF is litigating (*Hepting v. AT&T*, 2006 WL 1581965 (N.D. Cal., July 20, 2006)) against the President's warrantless wiretapping program because the available facts demonstrate that the President's program violates existing federal law and the U.S. Constitution.

Unfortunately, the President's program has thus far escaped meaningful Congressional inquiry into its facts; no Congressional committee has exercised its investigatory powers to subpoena telecommunications company executives to examine their role in surveillance on behalf of the National Security Agency. Absent honest public discussion, there is no justification for legislation that attempts to authorize the President's warrantless wiretapping program. We therefore write to express our complete opposition to H.R. 5825, the Electronic Surveillance Modernization Act, through which Congress would not only abdicate its Constitutional responsibility to oversee domestic surveillance but could expand Presidential power beyond reason.

H.R. 5825 is confused and poorly written, and EFF shares the American Civil Liberties Union and the Center for Democracy and Technology's objections to the bill's text. Our focus in this letter, however, is on a new provision of the bill – the amendment introduced by Rep. Cannon -- which the Executive Branch could argue nullifies any Congressional controls on intelligence surveillance, even in the United States.

The Cannon Amendment provides in pertinent part that, notwithstanding any other law:

"[N]o action shall lie or be maintained in any court, and no penalty, sanction, or other form of remedy or relief shall be imposed by any court or any other body, against any person for an activity arising from or relating to any alleged intelligence program involving electronic surveillance that the Attorney General or a designee of the Attorney General certifies, in a manner consistent with the protection of State secrets, is, was, or would be intended to protect

the United States from a terrorist attack. This section shall apply to all actions or proceedings pending on or after the effective date of this Act."

The Cannon Amendment could make the entire statutory structure irrelevant by giving the Attorney General (or his designee) the unilateral power to pardon anyone who conducts or assists in illegal electronic surveillance, including government employees and complicit phone companies. Indeed, the Executive Branch could conceivably argue that this language authorizes pardons for any physical activity related to any intelligence program that "involves" electronic surveillance if "intended" to protect the United States from a terrorist attack.

In short, H.R. 5825's claim of "modernization" is nothing of the kind. It is instead a blank check for the Executive Branch to continue spying on Americans without a warrant or other judicial oversight, and without meaningful Congressional inquiry. EFF respectfully and adamantly opposes H.R. 5825.

Sincerely yours,

/s/

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